

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 855 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

RASIKLAL CHIMANLAL NAGARI

Versus

A M C

Appearance:

MR PV NANAVATI for Petitioners

MR MG NAGARKAR for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 10/03/2000

ORAL JUDGEMENT

1. The appellants who are the original plaintiffs have filed this appeal and challenged the judgment and order dated 19th February 1980 passed by the learned City Civil Judge, Ahmedabad in Civil Suit No. 3197 of 1975 whereby the learned judge was pleased to dismiss the suit. The plaintiffs filed the suit for mandatory

injunction directing the defendant- Corporation to remove the wall constructed by it on the western side of the plaintiffs' house and for permanent injunction restraining it from raising any wall or any like construction in the open land on the western side of the plaintiffs' house so as to obstruct light and air in the plaintiffs' house.

2. The plaintiffs pleaded in the suit that they are the owners of house bearing Municipal Census No. 354 etc. and survey nos. 580, 584, 582/B and 2501 known as Nagri building situated on Astodiya Road, Ahmedabad. To the west of the suit house, there is a primary school building belonging to the defendant. There are several doors, windows, ventilations and galleries in the suit house towards its west opening on the open land of the municipal school. Towards the southern side corner of the open land of the municipal school, the defendant has constructed a garage and a room. All these windows, ventilations and galleries have been in existence since 1932 when the plaintiffs constructed the suit house. It is the case of the plaintiffs that they have been receiving light and air in the suit house through such windows, ventilations and galleries. It is the further case of the plaintiffs that on 16th October 1975, the defendant raised a wall of about 20 feet in length and 5 feet in height on the garage and the room portion towards the southern corner of the open land of the municipal school situated towards the west of the suit house which resulted into deprivation of light and air to the plaintiffs in the suit house.

3. The defendant in its written statement Ex. 15 resisted the suit on various grounds and denied the claim of the plaintiffs. It was inter alia pointed out that an application for building permission was submitted to the Corporation by the plaintiffs in January 1971; that in the plan accompanying the said application, a strip of land was shown open; that it was meant to convey that the ventilation in the suit property in the western side would be available from the strip of land kept open by the plaintiffs; that this is inconsistent with and contrary to the plaintiffs' case of easementary right of light and air over and across the adjoining plot belonging to the Corporation and housing the municipal school building; that the defendant does not intend to extend the height of the wall; that the construction of wall of 20 feet in length and 5 feet in height does not affect in any material degree the alleged easementary rights of light and air of the plaintiffs and that the plaintiffs are not entitled to any relief claimed in the

suit.

4. The learned trial judge, after appreciating the evidence on record, recorded a finding that the plaintiffs have failed to prove that they have easementary right of light and air in respect of the suit property from its southwest direction and, therefore, the plaintiffs are not entitled to claim the relief as prayed for in the suit.

5. The plaintiff no.1 is examined at Ex. 35 and his witness Balmukund Joshi is examined at Ex. 47. The defendant has not led any evidence. However, they have produced two files on the record of the case.

6. Having gone through the oral evidence of the plaintiff no.1 which is not seriously challenged in the cross examination, I am of the opinion that the plaintiffs have established that there are windows, ventilations, doors and galleries on the western side of the suit house.

7. The next question that arises is whether the plaintiffs have easementary right of light and air in the suit house. It is not in dispute that the plaintiffs, in January 1971, had submitted building plans when they wanted to make some alterations in the suit property. The building plan is in the file at Ex. 22. The building plan shows the existence of a small strip of land open on the western side of the suit house between the western wall of the suit house and the eastern boundary of the municipal school compound. The plaintiff no.1 of course has denied the existence of such an open strip of land. However, the plaintiffs' witness Ex. 47 has admitted the existence of the strip of open land of about 3 feet in width on the western side of the suit land. The existence of open strip of land of 3 feet in width on the western side of the suit house between the western side of the suit house and eastern boundary of the municipal school compound belonging to the defendant would on the contrary go to establish that the plaintiffs cannot have the easementary right of light and air in the suit house from its western direction over and above the open land of the municipal school compound. The learned judge in fact has also held accordingly. According to the learned judge, it is possible that when the plaintiffs made additions and alterations to the suit house in 1991, the windows, ventilations and galleries were permitted on the western side of the suit house for the simple reason that there was an open strip of land of 3 feet in width between the western wall of the suit

house and eastern boundary of the municipal school compound. In my opinion, the conclusion reached by the learned trial judge cannot be thwarted. Apart from this, the impugned construction is only 5 feet in height. Even if the alleged easementary right of light and air has come to be established on behalf of the plaintiffs, there is no satisfactory evidence for coming to the conclusion that this construction of the wall of 5 feet in height and 20 feet in length has materially impaired the easementary right of light and air as claimed by the plaintiffs in the suit. The learned judge has further observed that it transpires from the evidence on record that the ground floor portion of the suit property is used by a Government office on lease. Nobody from the Government office is examined to show how the light and air in the suit property has come to be diminished on account of the construction of a compound wall of 20 feet in length and 5 feet in height made by the defendant on the eastern limit of its municipal school compound. In absence of any independent witness or some officials of the Government office functioning on the ground floor of the suit house as to diminution of light and air on account of the construction of wall on the eastern limit of the municipal school compound, in my opinion, it will not be just and proper to grant the relief as prayed for by the plaintiffs in the suit, particularly when the defendant has stated in the written statement that it does not want to extend the height of the said wall. I am also told by the learned advocates appearing for the parties that the portion which is let out to the Government and which is being used as Postoffice at present, for safety reasons, the doors and windows are not opened. This is an additional circumstance for dismissing the suit filed by the plaintiffs. In this view of the matter, I see no merit in this appeal. In my opinion, the learned trial judge was justified in dismissing the suit.

There being no substance in this appeal, it is dismissed with costs.

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